No. 16-1363

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,

v.

MONY PREAP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. The "When The Alien Is Released" Clause Of 8 U.S.C. § 1226(c)(1) Is Not Surplusage. 3

II. Respondents' Interpretation Of "When The Alien Is Released" Is Not Supported By The Purpose Or Legislative History Of IIRAIRA. 5

A. IIRAIRA: Tightening Control, Closing Loopholes, and Preventing Windfalls. 5

B. The Legislative History of § 1226(c) and Congress's Concern That Criminal Aliens Be Detained. 7

C. The Transition Period Custody Rules Rulemaking Process Supports a Finding that the "When The Alien Is Released" Clause Has Been Properly Interpreted by the Board Of Immigration Appeals. 8

III. DHS Often Lacks The Ability To Accomplish Immediate Detention Of An Alien Under § 1226(c) Because State And Local Cooperation Is Withheld. 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Arizona Dream Act Coal. v. Brewer,
818 F.3d 101 (9th Cir. 2016) 1

Castaneda v. Souza,
810 F.3d 15 (1st Cir. 2015) 3

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984) 10

Demore v. Kim,
538 U.S. 510 (2003) 7, 8

Gordon v. Lynch,
842 F.3d 66 (1st Cir. 2016) 3

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 10

Hosh v. Lucero,
680 F.3d 375 (4th Cir. 2012) 3

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 7

Kokoszka v. Belford,
417 U.S. 642 (1974) 10

Lora v. Shanahan,
804 F.3d 601 (2d. Cir. 2015) 3, 13

Matter of Agour,
26 I. & N. Dec. 566 (B.I.A. 2015) 5

Matter of Arreola,
25 I. & N. Dec. 267 (B.I.A. June 23, 2010) 4

Matter of C-T-L-,
25 I. & N. Dec. 341 (B.I.A. 2010) 1

Matter of Noble,
21 I. & N. Dec. 672 (B.I.A. 1997) 9, 10

Matter of Rojas,
23 I. & N. Dec. 117 (B.I.A. 2001) 3, 9, 13

Matter of Silva-Trevino,
26 I. & N. Dec. 826 (B.I.A. 2016) 1

In re N-J-B-,
21 I. & N. Dec. 812 (B.I.A. 1997) 6

Ofosu v. McElroy,
98 F.3d 694 (2d Cir. 1996) 10

Olmos v. Holder,
780 F.3d 1313 (10th Cir. 2015) 3

Philbrook v. Glodgett,
421 U.S. 707 (1975) 10

Save Jobs USA v. U.S. Dep't of Homeland Sec.,
No. 16-5287 (D.C. Cir., filed Sept. 28, 2016) 1

Sylvain v. Att'y Gen. of the United States,
714 F.3d 150 (3d Cir. 2013) 3

Trump v. Hawaii,
No. 17-17168 (S. Ct. argued Apr. 25, 2018) 1

United States v. Boisdore's Heirs,
49 U.S. (8 How.) 113 (1850) 5

United States v. Texas,
136 S. Ct. 2271 (2016) 1

Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.,
74 F. Supp. 3d 247 (D.D.C. 2014) 1

Wong Wing v. United States,
163 U.S. 228 (1896) 7

CONSTITUTION

U.S. Const. art. VI, cl. 2 13

STATUTES AND REGULATIONS

6 U.S.C. § 202(3) 2

8 C.F.R. § 236.1(c)(8) 8

8 U.S.C. § 1101(a)(13)(A) 5

8 U.S.C. § 1182(a)(9)(B) 6

8 U.S.C. § 1182(c) (repealed 1996) 6

8 U.S.C. § 1226(a)(1)(A)-(D) 9

8 U.S.C. § 1226(c) ..... *passim*

8 U.S.C. § 1226(c)(1) 2, 3, 4

8 U.S.C. § 1226(c)(1)(A)-(D) 4, 13

8 U.S.C. § 1226(d) 11, 13

8 U.S.C. § 1229b(a) 6

8 U.S.C. § 1229b(b) 6

8 U.S.C. § 1231(a)(2) 4

8 U.S.C. § 1231(a)(4)(A) 4

8 U.S.C. § 1357(g)(10) 11

Cal. Gov't Code § 7282.5(a) 12

Cal. Gov't Code § 7284.6(a)(4) 12

IIRAIRA, Pub. L. No. 104-208, § 301, 110 Stat. 3009, 3009-575 (1996) 5, 6

IIRAIRA, Pub. L. 104-208, § 301, 110 Stat. 3009, 3009-576 6

IIRAIRA, Pub. L. No. 104-208, § 303, 110 Stat. 3009, 3009-585 (1996) 5

IIRAIRA, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009 9

IIRAIRA, Pub. L. 104-208, § 304, 110 Stat. 3009, 3009-594 6

OTHER AUTHORITIES

H.R. Rep. No. 104-469 (1995) 7, 8

Madison Park, *ICE blasts Oakland mayor over her warning. She stands by her decision*, CNN (Mar. 1, 2018), https://www.cnn.com/2018/02/28/us/oakland-mayor-libby-schaaf-ice-arrests/index.html 14

Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Services and for the Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27441 (May 19, 1998) 9, 10

Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws, Federation for American Immigration Reform 1 (2018) 12

S. Rep. 104-48 (1995) 6, 7, 12

S. Rep. No. 104-249 (1996) 2

S. Rep. No. 104-429 (1996) 11

INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, No. 17-17168 (S. Ct. argued Apr. 25, 2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

SUMMARY OF THE ARGUMENT

"No matter how successful Congress might be in crafting a set of immigration laws that would—in theory—lead to the most long-term benefits to the

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[1] Petitioners and Respondents have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

American people, such benefits will not occur if those laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996). Title 8 U.S.C. § 1226(c)(1) requires that the Department of Homeland Security ("DHS")[2] take custody of certain criminal aliens "when the alien is released . . . ." In § 1226(c), Congress crafted an immigration law to protect the American people from criminal aliens. Now, Respondents seek to erode Congress's command that certain classes of criminal aliens are subject to mandatory detention by placing a limit on the time DHS has to take custody of such aliens. While immediacy is to be preferred, it is not required by the statute's language or history.

The parties focus their arguments on the text of the statute—specifically, its "when the alien is released" clause—and competing precedent. Herein, Petitioners' arguments are supplemented by the observation that the clause referred to plays a vital role in the statute under Petitioners' meaning, and is not surplusage. Additionally, the overall structure and legislative history of the Illegal Immigration and Immigrant Responsibility Act ("IIRAIRA") strongly supports the conclusion that the "when the alien is released" clause does not create an implied deadline for assuming custody. Finally, Congress's understanding that state and local jurisdictions may attempt to thwart federal officials from taking custody of criminal aliens strongly

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[2] Congress transferred to the Secretary of the Department of Homeland Security the enforcement power of the Immigration and Nationality Act. 6 U.S.C. § 202(3). DHS, specifically U.S. Immigration and Customs Enforcement ("ICE"), is responsible for detaining aliens under 8 U.S.C. § 1226(c).

indicates that it did not intend Respondents' interpretation.

ARGUMENT

I. The "When The Alien Is Released" Clause Of 8 U.S.C. § 1226(c)(1) Is Not Surplusage.

In *Matter of Rojas*, the Board of Immigration Appeals ("BIA") found that federal immigration authorities do not lose the ability to detain an alien subject to mandatory detention even if the alien is not taken into custody immediately. 23 I. & N. Dec. 117, 127 (B.I.A. 2001). Among the courts of appeals, only the court below has reached a conclusion opposite to that of the BIA.[3]

Respondents argue that the "when the alien is released" clause cannot be read merely as stating the earliest point at which DHS may take criminal aliens into custody because such a reading would render the clause mere surplusage, serving no purpose. Br. in Opp'n to Pet. for Cert. 23-24. But the flaw in this argument is obvious. If the clause were indeed superfluous, it could be taken out without change to the meaning of the statute—and such is far from the case. Without this clause, DHS could attempt to gain custody of an alien immediately rather than waiting for

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[3] *See Lora v. Shanahan*, 804 F.3d 601, 610 (2d. Cir. 2015); *Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 157 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375, 378 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313, 1316 (10th Cir. 2015), *but see Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (evenly divided); *Gordon v. Lynch*, 842 F.3d 66, 71 (1st Cir. 2016) (remanding back to the district court).

release from a non-DHS custodian.[4] Indeed, if the "when the alien is released" clause were eliminated from the section, subsection (1) would command the Secretary to take custody "without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." Respondents have taken for granted that without the "when the alien is released" clause, DHS would assume that it could only take custody after the alien is released from non-DHS custody. On the contrary, reading subsection (1) without the "when the alien is released" clause seems to give DHS full rein to take custody of an alien before such time, and every reason to conclude that Congress has mandated, by using the word "shall," that DHS take custody regardless of whether another entity currently has custody. The "when the alien is released" clause is thus necessary to clarify that immigration officials cannot simply demand custody, at any time, of an alien who has committed a requisite offense. *See Matter of Arreola*, 25 I. & N. Dec. 267, 269 (B.I.A. June 23, 2010) (clarifying that mandatory detention of a criminal alien does not accrue until he or she is released from non-DHS custody for an offense listed in § 1226(c)(1)(A)-(D)). In other words, the clause does exactly what Petitioners assert: it triggers DHS's control over the alien.

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[4] As Petitioners point out, this clause thus brings § 1226(c)(1) into harmony with other INA provisions regarding when DHS may take custody of an alien. 8 U.S.C. § 1231(a)(2), (a)(4)(A); Pet'rs' Br. 18.

II. Respondents' Interpretation Of "When The Alien Is Released" Is Not Supported By The Purpose Or Legislative History Of IIRAIRA.

A. IIRAIRA: Tightening Control, Closing Loopholes, and Preventing Windfalls.

The current iteration of the mandatory detention statute for criminal aliens was passed in 1996 as part of IIRAIRA. IIRAIRA, Pub. L. No. 104-208, § 303, 110 Stat. 3009, 3009-585 (1996). Where the statutory language itself does not answer the question of how a statute should be interpreted, courts may look to the act as a whole to decipher what Congress's intent was. *United States v. Boisdore's Heirs*, 49 U.S. (8 How.) 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its objects and policy."). Specific provisions either altered or added by IIRAIRA show a clear intent to discourage illegal immigration and to prevent criminal aliens from taking advantage of our immigration system.

IIRAIRA added several provisions to discourage both illegal immigration and criminal activity. Arguably, the most sweeping and fundamental change of IIRAIRA was replacing presence and entry into the United States with the stricter lawful admission requirement. Before IIRIRA, entry was statutorily defined as the "coming of an alien into the United States, from a foreign port or place or from an outlying possession." *Matter of Agour*, 26 I. & N. Dec. 566, 571-72 (B.I.A. 2015) (citation omitted). IIRIRA § 301 replaced that definition of entry with the new definition of admission, 8 U.S.C. § 1101(a)(13)(A),

which excludes persons whose presence in the United States is unauthorized. IIRAIRA, Pub. L. No. 104-208, § 301, 110 Stat. 3009, 3009-575 (1996).

The second change made by IIRAIRA was to create penalties for unlawful presence to ensure that aliens did not receive a windfall for eluding immigration officials. Specifically, Congress created the three- and ten-year bars under 8 U.S.C. § 1182(a)(9)(B). These provisions prevent aliens who accrue unlawful presence in the United States and then depart from re-entering the country for either three or ten years, depending upon how long they were unlawfully present in the United States. IIRAIRA, Pub. L. 104-208, § 301, 110 Stat. 3009, 3009-576. This change conveyed a strong message that unlawful presence itself, regardless of any other unlawful action, now would be detrimental to future admission.

One final example of Congress' intent to ensure the American people were protected from criminal aliens was the elimination of relief under INA § 212(c), the most common type of relief sought by criminal aliens at the time, and the promulgation of cancellation of removal under 8 U.S.C. § 1229b(a) & (b). IIRAIRA, Pub. L. 104-208, § 304, 110 Stat. 3009, 3009-594; S. Rep. 104-48, at 28 (1995). These provisions prevented an alien from seeking cancellation of removal for certain offenses, such as the newly broadened categories of aggravated felonies and other criminal acts. "Congress clearly intended to limit the categories of undocumented aliens eligible for such relief and to limit the circumstances under which any relief may be granted." *In re N-J-B-*, 21 I. & N. Dec. 812, 813 (B.I.A. 1997). While not an exhaustive list,

these three changes from IIRAIRA represent Congress's intent to improve our immigration laws to close loopholes and prevent windfalls from being exploited by illegal and criminal aliens. A Congress with such an intent would not have also intended, in a phrase that is at best ambiguous, to reward aliens simply because they had eluded capture by DHS.

B. The Legislative History of § 1226(c) and Congress's Concern That Criminal Aliens Be Detained.

Where the statutory language is unclear and open to multiple interpretations, legislative history is a useful tool in deciphering Congress's intent. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The immigration laws of this country have always included detention provisions, and this Court has upheld detention as a facet of immigration enforcement. "[Detention] . . . as part of the means necessary to give effect to the provisions for the [removal] of aliens would be valid. Proceedings to [remove] would be in vain if those accused could not be held in custody pending the inquiry into their true character . . . ." *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

In 1996, Congress noted that the requirements of the current immigration laws were not being met, and specifically referenced the delays and abuses of deportation processes by criminal aliens. S. Rep. No. 104-48, at 12, 26. IIRAIRA was passed due to the "wholesale failure by INS to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003); H.R. Rep. No. 104-469, at 123 (1995). At that time, 20% of criminal aliens absconded. S. Rep. No. 104-48, at 1. Additionally, criminal aliens who

remain at large in the U.S. tend to commit more crimes before finally being removed. *Demore v. Kim*, 538 U.S. at 518. Against this background, Congress noted that the use of bond by the agency was a hurdle to removing criminal aliens. H.R. Rep. 104-469, at 124.

With these concerns setting the scene for IIRAIRA's passage, Congress determined that certain criminal aliens should not go before an Immigration Judge ("IJ") for a bond hearing. Under 8 C.F.R. § 236.1(c)(8), when bond determinations are made, the alien must show that "release would not pose a danger, . . . and that the alien is likely to appear for any future proceeding." Here, Congress weighed these exact concerns—future danger and the likelihood to appear—to find that the risks that criminal aliens pose were too great to subject the American people to them, and so determined that case-by-case bond determination for certain criminal aliens was inappropriate. Respondents' attempt to amend this determination by making an exception for aliens who are able to evade ICE flies in the face of Congress's clear intent to take bond decisions out of the hands of IJs.

C. The Transition Period Custody Rules Rulemaking Process Supports a Finding that the "When The Alien Is Released" Clause Has Been Properly Interpreted by the Board Of Immigration Appeals.

When Congress passed IIRAIRA, it recognized that detention space and personnel were not available for the full implementation of the immigration statutes. The Transition Period Custody Rules ("TPCR") were intended to provide a stopgap for the mandatory detention of certain, more narrowly-defined classes of

criminal aliens. IIRAIRA, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009, 3009-586-87. Importantly, TPCR contains the identical clause at issue in this case, "when the alien is released."

The BIA analyzed the meaning of the "when the alien is released" clause in TPCR in *Matter of Noble*, 21 I. & N. Dec. 672 (B.I.A. 1997). The Board concluded that the clause modified the "Attorney General shall take into custody" language and "specifies the time at which that duty arises." *Id.* at 680. This conclusion aligns with the Board's later decision in *Matter of Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001) (holding, under *Chevron*, that the language "when the alien is released" is ambiguous and determining that if an alien is not taken into immediate custody by the agency, § 1226(c) can still apply to those aliens categorized in § 1226(a)(1)(A) – (D)).

On May 19, 1998, the Immigration and Naturalization Service ("INS")[5] and the Executive Office for Immigration Review ("EOIR") promulgated a final rule detailing the procedures for TPCR. Recognizing the important effects these rules had on the safety of the country, Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Services and for the Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27441, 27441 (May 19, 1998), the final rule noted that mandatory detention for some criminal aliens is needed because their risk of absconding is great, and when an alien

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[5] The responsibilities of INS have been taken over by DHS, specifically, ICE.

absconds, "INS lacks the resources to conduct a dragnet," *id.* at 27442 (citing *Ofosu v. McElroy*, 98 F.3d 694, 702 (2d Cir. 1996)). The agencies thus found that mandatory detention minimizes the waste of government resources. *Id.* at 27443. Importantly, the final rule briefly discussed the meaning of "when the alien is released." Certain commentators had suggested that the "when the alien is released" clause only applies to criminal aliens released directly from incarceration, but this conclusion was rejected. *Id.* at 27447. Instead, INS and EOIR threw their weight behind the BIA's determination in *Matter of Noble*, which found that the clause specified when the Attorney General's duty to take a criminal alien into custody arises. *Id.*

Courts are to construe a term or phrase consistently throughout an act or body of law, rather than treat its instances as isolated provisions to be independently analyzed. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 561 (1995) (citing *Philbrook v. Glodgett*, 421 U.S. 707 713 (1975)); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). On this principle, this Court would be hard-pressed not to afford *Chevron* deference to two agencies that have found in favor of Petitioners' conclusion. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844-45 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .").

III. DHS Often Lacks The Ability To Accomplish Immediate Detention Of An Alien Under § 1226(c) Because State And Local Cooperation Is Withheld.

Consultation between federal and state officials is an important feature of our immigration system. Throughout the Immigration and Nationality Act ("INA"), there is evidence that Congress envisioned a federal and state partnership aimed at curbing illegal immigration and keeping our country safe.

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and Local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of Immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-429, at 19-20 (1996). For example, 8 U.S.C. § 1357(g)(10) permits state and local officials to communicate and cooperate with ICE "in the identification, apprehension, detention, or removal of aliens . . . ."

Section 1226 even acknowledges that the identification of criminal aliens relies on state and local law enforcement cooperation. Under § 1226(d), the government is instructed by Congress to implement an open communications system to determine if individuals who commit qualifying aggravated felonies are aliens, and thus could be detained under § 1226(c). Congress understood that the success of § 1226(c)'s

mandatory detention provision was dependent upon state and local officials; and Congress was willing to devote the necessary resources to that relationship for it to flourish.

While Congress envisioned a seamless relationship between federal and state and local officials working towards the common goal of detaining criminal aliens, even at the time IIRAIRA was passed, some jurisdictions had worked to demolish this relationship. S. Rep. No. 104-48, at 2 ("To make matters even more difficult for immigration officials, some local communities have adopted official policies of non-cooperation with the INS. Public employees in these communities are prohibited from providing information to the INS or cooperating with the INS in most circumstances."). Since then, many jurisdictions have put their own citizens at risk by passing legislation limiting cooperation with federal immigration officials. In 2000, only 11 such jurisdictions existed.[6] In 2018, there are approximately 564 jurisdictions that in some way curb or prohibit cooperation between state and local officials and DHS.[7] One of the most egregious examples is California's SB 54, which prohibits the sharing of aliens' release dates, and their personal information, with DHS, and goes so far as to forbid the transfer of custody of aliens to ICE. Cal. Gov't Code §§ 7284.6(a)(4), 7282.5(a).

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[6] *Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws*, Federation for American Immigration Reform 1, 1 (2018) (providing a report on the number of sanctuary city jurisdictions in the United States).

[7] *Id.*

As explained above, DHS often relies on state and local jurisdictions to communicate basic information about criminal aliens subject to mandatory detention under § 1226(c). Considering that Congress, through statute, specifically acknowledged that detaining criminal aliens would be dependent upon local law enforcement's cooperation, and even devoted § 1226(d) to facilitating communication, it is unlikely that the "when . . . released" clause was intended to require immediate or even prompt detention by DHS. As the BIA put it, "it is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Matter of Rojas*, 23 I. & N. Dec. at 128; *Lora v. Shanahan*, 804 F.3d at 612-13. Indeed, this technique for gaining custody of an alien is the exact "dragnet" technique Congress was looking to avoid with TPCR and § 1226(c).

A requirement of promptness or immediacy, moreover, would only allow jurisdictions such as California to deprive § 1226(c) of its intended effect, thus augmenting such jurisdictions' (already unconstitutional and preempted, U.S. Const. art. VI, cl. 2) interference with federal immigration enforcement. For example, an alien who was confined in Oakland, California, for a violation that falls under § 1226(c)(1)(A)-(D) could evade detention by ICE because California forbids the transfer of custody to ICE. Such an alien might further evade ICE detention by benefiting from the public warning Oakland's mayor Libby Schaaf gave of an impending ICE raid in the

area.[8] Under the Respondents' interpretation, the alien's evasion of ICE, with the help of state and local officials, for a long enough period of time would prevent ICE from taking custody and applying the mandatory detention provisions of §1226(c). Thus empowering jurisdictions to engage in unconstitutional interference with federal immigration enforcement even more than they already do is not a result it is plausible Congress envisioned, nor one that should be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the judgement of the court below should be reversed.

Respectfully submitted,

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[8] *See* Madison Park, *ICE blasts Oakland mayor over her warning. She stands by her decision*, CNN (Mar. 1, 2018), https://www.cnn.com/2018/02/28/us/oakland-mayor-libby-schaaf-ice-arrests/index.html.